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Attention Consumers of Justice:
Court Reform Should Begin in the Classroom
Part II

by John W. Cooley

"[T]he country has outgrown our present judicial system."
President Lincoln, 1861

"[T]he present impact of the caseload crisis on the federal courts... is serious now, but it threatens to become even more so."
Chief Justice Rehnquist, 1992

INTRODUCTION

Over the last century, well intentioned court reformers have succeeded in creating a judicial machine of Frankenstein-monster proportions. It is not likely that any of the latest reform proposals, just as those which preceded them, will guarantee a more speedy and less expensive civil justice system. The problem is that we have been working on solving the wrong problem. We see only the symptoms of a disease in the dysfunction of our civil justice system. The disease we need to cure is not in our system of litigation, but rather in our system of education.

Part I of this two-part article described some ideas for court system design generated by undergraduate seniors in a dispute resolution course which I taught at Northwestern University in the Fall of 1990. In Part II of the article, I will review the history of court reform in this country as well as the most recent suggestions for reforming the civil justice system. Then, I will explain why the best way to reform the American court system is to reform the American legal education system.

I. TWO HUNDRED YEARS OF JUDICIAL REFORM

In response to complaints about the civil justice system, specific efforts have been made over the last two centuries to improve the delivery of civil justice in our federal court system. The Constitutional Convention adopted Article III of the Constitution requiring that the "judicial power of the United States,... be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." Recognizing the chaotic state of the English system of justice in the seventeenth and eighteenth centuries, after which the colonial and state systems were modeled, the First Congress enacted the Judiciary Act of 1789. It created a system of lower federal courts to function alongside the courts already established in each state. The design consisted of three levels of federal courts: the Supreme Court, composed of a chief justice along with five associate justices; eleven circuit courts, consisting of two Supreme Court justices and the district judge from the state in which the circuit court was sitting; and thirteen district courts, each with its own district judge.

A. Organizing the Expanding Courts

Historically, the period between 1789 and the Civil War was one of unprecedented expansion of the federal court system. Both the number of states and the number of U.S. territorial possessions increased. Also during this period, the number of circuits...
and the number of Supreme Court (circuit riding) justices increased. By 1861, a growing sense of frustration with the ineffectiveness of the federal court system influenced President Lincoln to warn dramatically in his first message to Congress: "[T]he country has outgrown our present judicial system." Afterward, a slight restriction on the circuit-riding obligations of justices brought temporary relief. But as time passed, case overload swelled and the federal court system’s ability to respond to it deteriorated.

In 1875, Congress adopted another Judiciary Act, which established general federal question jurisdiction in the federal trial courts for cases involving $500 or more. Federal question jurisdiction allowed the federal courts to try causes of action arising under the constitution and laws of the United States. The Circuit Court of Appeals Act of 1891 eventually gave this proposal life, creating a circuit court of appeals for each of the nine circuits. In essence, the 1891 Act shifted the appellate caseload burden from the Supreme Court to the courts of appeals, thereby making the federal district courts the system’s primary trial courts. While the Act did not abolish circuit riding specifically, it made circuit riding "optional," allowing a judicial anachronism to disappear quietly. The Act’s favorable impact on the Supreme Court’s workload was almost immediately obvious. New filings totaled 623 in 1890, fell to 379 in 1891, and to 275 in 1892. On paper, the Act seemed to have solved the Supreme Court’s overload problem. In actuality, the Act simply created another tier of the judicial machinery — the federal courts of appeals — which would be straining under extreme overload about a century later. As the twentieth century dawned, a new spirit of court reform was in the wind.

B. Reform at the Turn of the Century

In 1906, a young lawyer from Nebraska named Roscoe Pound, struck the spark that some say, "kindled the white flame of progress" for the civil justice system. He delivered an address at the American Bar Association’s ("ABA") annual meeting entitled: "The Causes of Popular Dissatisfaction with Justice." Pound believed that the causes of popular dissatisfaction with the courts included an archaic system of courts, outmoded court procedures, wasted judicial power, and the politicization of the courts. These existing conditions, he believed, had almost destroyed the traditional respect for the courts.

Conservatives viewed Pound’s speech as a drastic and unjustified attack which was initially "decently buried." In a short time, however, Pound’s ideas began to spread. In 1909, the ABA’s specially appointed committee issued a report discussing the concept of court unification and rulemaking. The ABA failed to endorse the report. Partially in response to this event, the American Judicature Society (“AJS”) was formed in 1913 and came to the forefront of court reform. By 1916, the ABA, under the presidency of Elihu Root, had changed its direction and began to support the causes for which AJS was striving. During the 1920s and 1930s, court reformers seemed most occupied with court rule-making and organizing case law. In 1921, Herbert Harley, founder of the AJS, became secretary of the Conference of ABA delegates and the ABA began to focus seriously on court reform.

In the same time frame, Chief Justice Taft, noting the tendency of each federal judge to insist on exercising his own methodology, succeeded in establishing the Conference of Senior Circuit Judges in 1922 (later, in 1939, to become the Judicial Conference of the United States) to facilitate and coordinate rule-making and to assist in the management of the business of the courts. In 1923, the American Law Institute was founded for the primary purpose of codifying American case law. These rule-making efforts culminated in the mid and late 1930s with Congress passing a law in 1934 empowering the Supreme Court to revise the federal rules, and with the adoption of the Federal Rules of Civil Procedure in 1938. Also, one year later, Congress created the Administrative Office of the United States Courts and enacted various changes relating to the management of the federal court system.

In 1940, court reform attention shifted to the state court systems. It...
was in that year that Roscoe Pound published a treatise on court reform and suggested several state court reform goals, including: consolidation of court structure and jurisdiction, simplification of court procedures, merit selection, centralization of court administration under a supreme court, professionally trained court administrators, and a unitary court budget.27 For almost two decades following World War II, the courts, in large measure, continued in their “time-honored, but often dysfunctional, methods and procedures virtually without examination or challenge.”28

C. Burger Renews Reform

Then, in 1969, Warren E. Burger began his tenure as Chief Justice of the Supreme Court with a preplanned agenda for court reform.29 His agenda had two basic components: remedies for “deferred maintenance” of the federal and state court systems and mechanisms for governmental interbranch communications. Soon after Burger assumed his position, the Institute for Court Management was established with the assistance of the ABA, the Institute of Judicial Administration, and other groups. In 1971, Congress created the position of Circuit Executive, and, in that same year, the National Center for State Courts was created.30 One of the highlights of Burger’s court reform crusade was the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, cosponsored by the ABA, the Conference of (State) Chief Justices and the U.S. Judicial Conference. The conference, soon dubbed the “Pound Conference,” convened leaders of the bench and bar as well as scholars from nonlegal disciplines.31 Some of the recommendations arising out of the Pound Conference related to establishing Neighborhood Justice Centers, revitalization of small claims courts, use of compulsory arbitration, increased use of administrative agencies, correction of discovery abuse, use of sanctions, reassessment of the class action procedure, reassessment of scope of the jury trial right, and reexamination of the utility of diversity jurisdiction.32 The 1980s hosted experimentation by both federal and state court systems, particularly in the area of using court-annexed compulsory arbitration and mediation programs.33 Despite the potential synergy of efforts of a number of professional and civic court reform organizations for nearly ten decades, as we approached the 1990s we were still experiencing the same congestion, delay and cost complaints concerning our present civil justice system.34 The reason for this cannot be fully understood without an examination of the present recommendations for civil justice reform.

D. Recent Efforts at Reform: More of the Same?

Perhaps at no time in history has there been so concentrated an inquiry into the functioning of the federal civil justice system, by all three branches of government and the ABA, in such a short period of time. During the last two years, the Federal Courts Study Committee issued its report (April, 1990); Congress enacted the Civil Justice Reform Act of 1990 (December, 1990); the President’s Council on Competitiveness issued its Agenda for Civil Justice Reform in America (August, 1991); and the ABA released its Blueprint for Improving the Civil Justice System (February, 1992). Each group identified problems with the present civil justice system and proposed specific remedies.

1. The federal courts report on problems

In late 1988, responding to “mounting public and professional concern with the federal courts’ congestion, delay, expense and expansion,”35 Congress authorized Chief Justice Rehnquist to appoint a fifteen-member bipartisan Federal Courts Study Committee to explore the problems facing the federal courts and to develop a long-range plan for the federal judiciary.36 The final report of the Committee was presented on April 2, 1990. Contending that “the long-expected crisis of the federal courts, caused by unabated rapid growth in case filings, is at last upon us,” the Committee report made separate recommendations to various branches of the federal government, to the state courts, to the bar, and to the research community generally.37 Included among the seventy topic areas of recommendations were those related to administrative appeals, appellate courts, alternative dispute resolution, attorneys fees, civil case management, discovery, diversity jurisdiction, judicial administration, juries, and pendant jurisdiction.

2. Congress acts to initiate reform

The Civil Justice Reform Act of 1990, 28 U.S.C. § 471 (1990), was enacted on December 1, 1990, as Title I of the Judicial Improvements Act of 1990.38 Congress noted that “high costs, long delays and insufficient judicial resources” all too often leave unfulfilled the “time-honored promise” of “the just, speedy and inexpensive resolution of civil disputes in our Nation’s federal courts.”39 Consequently, Congress saw
the need to mandate each federal district court to design and implement a civil justice expense and delay reduction plan. The purposes of each plan are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes. Each district court plan must be developed after consideration of the recommendations of a district court “advisory group” composed of attorneys and other representatives of litigants (consumers) in the courts as determined by the chief judge of the district court. Each district court may consider and include the following in its plan: early ongoing control of the pretrial process, control of the extent of discovery and time for its completion, encouragement of voluntary exchange of information, reference of appropriate cases to alternative dispute resolution programs, requirement of parties with settlement authority to be present in person or by telephone during settlement conferences, and requirement of counsel to jointly present a discovery management plan.

After careful evaluation of the plans, the Judicial Conference of the United States must prepare and periodically revise a Manual for Litigation Management and Cost and Delay Reduction for distribution to the district courts. The Federal Judicial Center and the Director of the Administrative Office of the United States Courts are required to develop and conduct comprehensive education and training programs for all judicial officers and clerks of court.

3. The Executive Branch sets a reform agenda

In August 1991, Vice President Dan Quayle, on behalf of the President’s Council on Competitiveness, introduced the Council’s fifty point Agenda for Civil Justice Reform in America in a widely-publicized speech at the annual meeting of the ABA. The stated purpose for developing the agenda was that in “the past 30 years, our legal system has become burdened with excessive costs and long delays . . . [and] many features of the current legal system no longer serve to expedite justice or to ensure fair results.” It was labeled by critics as a pro corporation political agenda, which sought to alter the balance between individual plaintiffs and corporate defendants. Some of the recommendations of the Council concerned voluntary alternative dispute resolution, pre-lawsuit notice, discovery reform, summary judgment reform, docket management, expert witness testimony, punitive damage containment, attorney fees, sanctions and diversity jurisdiction.

4. The ABA proposes reform

The ABA’s Working Group on Civil Justice System Proposals issued its Blueprint for Improving the Civil Justice System in February 1992. The Blueprint was issued after the Working Group’s careful study of the Council on Competitiveness’ Agenda. Regarding that Agenda, the Working Group acknowledged that while “many of the Agenda proposals are supported by the ABA,” “. . . [t]he Agenda is in large part a piecemeal collection of proposals promulgated over the years by other entities, including the ABA, but the pieces chosen by the Council do not make a whole.” The ABA proposals for reform concerned access to and funding and management of the judicial system, accessibility of justice to the poor, and to the working population, tort and insurance liability, alternative dispute resolution, discovery, more effective trial procedures, expert evidence reform, punitive damages, attorney fees, and diversity jurisdiction. The ABA Blueprint also contained a point-by-point critique of the Federal Courts’ Study Committee recommendations, noting either support, opposition, or no position as to each recommendation.

The above description of the status of current federal court reform should strike fear in the hearts of thinking consumers of civil justice in America. Here we have three separate bodies making what could be construed as two hundred or more recommendations for federal civil justice reform, while Congress is simultaneously requiring each of more than ninety district courts to develop separate plans to reduce the cost and delay of litigation. This seemingly unaligned, splintered, partially political, and in some aspects, adversarial approach to problem solving reflects a competitiveness regrettably characteristic of today’s legal profession. The present situation calls for the services not of a Solomon-like decisionmaker, but rather of a Job-like peacemaker. Otherwise, we are destined to repeat the mistakes of history.

II. A DIFFERENT APPROACH: REFORM LEGAL EDUCATION

For many readers, shifting attention from a perceived problem of litigation to a proposed problem of education may evoke a sense of disinterestedness — a “that’s not my department” feeling. But, in reality, for every legal professional and every consumer of justice, education is our department. Education is the simple answer to the child’s question: How can we make our justice system work? The creative design steps that must be taken now to guarantee an efficient, effective, and economical civil justice system in the twenty-first century involve only minimal court structural design modifications, but substantial educational design modifications.

While the solution to the justice system problem lies in the proper education of all strata of society, we must
teach our youth, in particular, about the nature of conflict and appropriate methods for managing and resolving it. I leave the generation of ideas regarding pre law school conflict resolution and management curricula largely to the education experts. However, I would like to share some ideas about reshaping the way we train law students in the United States.

If we are to reduce pressure on the courts and increase the prospects of speedy and inexpensive civil justice, we must completely revamp our approach to legal education in the United States. We must seriously consider discarding the case method approach to legal education or at the very least, we must drastically de-emphasize it. By focusing on cases practically from the first day a student enters law school, we are communicating the impression that the courts are the primary resource for resolving conflict. Actually, case law largely represents documented failure of the parties and counsel to reach a mutually acceptable resolution of their conflicts. In many instances, mutually acceptable solutions are not reached because most lawyers were not taught how to negotiate effectively. Our present justice system exacerbates the situation by relentless publication of stories about failed negotiations elevated to the status of "judicial opinions." The judicial system needs fewer judicial opinions and more effective group decisionmaking by disputants and their lawyers.

Emphasis in law school training should be on the cognitive and behavioral processes that are the essence and foundation of lawyering skills. The underlying cognitive and behavioral processes need to be understood in order to develop efficient lawyering skills. Courses should be designed around processes of thinking, learning, communication, investigation, problem solving, and decisionmaking. After these foundational process courses, law school training should focus on conflict resolution processes such as negotiation, alternative dispute resolution, trial, and appeal. Ethics should be taught in relation to all of the processes.

Knowledge of specific bodies of law is useful, but secondary. Any competent lawyer can become an expert on any legal issue in any topical area through legal research. However, a lawyer cannot develop negotiation or trial skills overnight. Nor can these skills be learned by reading a book. Learning these types of skills depends on multiple behavioral experiences in a variety of factual and legal situations. It is on these types of process based skills that law schools should focus in order to prepare graduates to be of more immediate value to their clients (as consumers of justice) and to the legal profession, generally. Just as importantly, nationwide law school training of this type would aid in solving the problem of an overused, unresponsive, and impractical civil justice system.

A. The Japan Analogy
To determine the specific components of a model of legal education that would help solve the continuing problem of court system congestion and expansion, we must employ a lateral thinking technique called "thought reversal." As an example, consider a society possessing no civil court system or judicial branch of government for civil disputes, but rather a system where all disputes are resolved, interpersonally, by the disputants themselves or through the assistance of third parties. In such a society, what would law school education be like?

As an aid to answering this question, we could employ another lateral thinking technique called "analogy." We would try to think of a society which closely approximates our imaginary society. One such society would be that of Japan. An examination of the nature of the legal training in that society generates ideas helpful in designing an answer to the question posed.

It is true, as some commentators have suggested, that a direct comparison of the Japanese legal system with that of the United States is unfair and inappropriate. There are significant historical and cultural differences between the two countries which account for Japan’s small number of lawyers and judges and its tiny, yet functional, court system. But that fact does not preclude the production of ideas based on an examination of the way that Japan trains lawyers in a court-adverse system. These ideas are useful in creating a legal system focused on private dispute resolution as opposed to excessive court involvement.

In Japan, there is only one law school in the whole country. Located in Tokyo, it is called the Legal Training and Research Institute. To enter the Institute, one must pass a grueling, competitive examination. Less than 2 percent of all applicants (usually numbering 30,000) qualify for admission. Each year, the Institute admits about 500 students and graduates about the same number. Graduating from its two year training program is a prerequisite
only improve the students' writing skills, but also help them cultivate the instructor. Draftsmanship sessions not and their writing is openly discussed in opinions based on actual court records, sessions, students draft judicial-type office, and the bar. In problem study procedures of the court, the prosecutor's functions and operational proce-

In the introductory lectures, students teach civil and criminal judging; prosecutors teach criminal prosecution; and practicing attorneys teach civil and criminal practice. But more relevant for our purposes, is the nature of the training the students receive.

The two years of training are divided into three terms: four months of initial training, sixteen months of field training, and four months of final training. Initial training consists of introductory lectures, problem study, draftsman-ship, special lectures, simulated trial and inspection tours, extracurricular courses, and general culture courses. In the introductory lectures, students are introduced to the organization, basic functions and operational procedures of the court, the prosecutor's office, and the bar. In problem study sessions, students draft judicial-type opinions based on actual court records, and their writing is openly discussed in class with appropriate critiques by an instructor. Draftsmanship sessions not only improve the students' writing skills, but also help them cultivate the ability to analyze facts and sharpen skills in both inductive and deductive logic. The students must watch a full day simulated trial conducted by the instructors followed by a half day commentary by two instructors. In addition, student groups observe actual trials and may also elect to attend a number of one to four, eighty-minute seminars on a variety of about sixteen legal topics.

Field training consists of rotating through assignments in the district court (eight months; four months each in the civil and criminal sections), district prosecutor's office (four months), and an office of a practicing attorney (four months). In the district court, the students are assigned to a judge to observe court proceedings, draft judgments, and receive critiques from their assigned judge. In the prosecutor's office, they learn investigation techniques, how prosecutorial discretion is exercised, and how to draft indictments. They also accompany prosecutors to trial and must be given the opportunity to be involved in at least twenty-five cases of various crimes during this training period. In the practicing attorney's office, the students learn to prepare complaints, briefs, and other documents.

Field training concludes with four weeks of simulated trials, with half-day seminars on a variety of legal topics.

To graduate from the Institute, a student must pass a final examination. There are four days of written examinations on civil and criminal trials, civil and criminal practice, prosecution, and general culture. This is followed by a two day oral examination testing the students' knowledge of civil and criminal matters.

B. Application to the United States System

It cannot be denied that many law schools across the United States have, in the past decade or so, adopted law school skills training opportunities for law students resembling aspects of the Japanese model. These include negotiation, alternative dispute resolution, trial practice, appellate practice courses and other practice oriented courses. But rarely do we find a law school in the United States which has taken a comprehensive approach to legal education in its institution which, like the Japanese model, de-emphasizes the case method, emphasizes development of practice skills, provides for non-elective rotating internships, and requires team teaching. These four elements are
necessary to produce effective legal practitioners and to resolve the problems of congested courts. The Japanese model is a start, but for us to achieve these two goals, that model must be modified. Our model must compensate for the fact that our system of government is primarily based on the concept of individual rights and that, as Americans, we do not have the historical and cultural orientation toward conciliation as the primary method of resolving disputes.

The law school curriculum described below represents only initial ideas intended to inspire further thought about the topic. It is also based on a few assumptions: (1) that elementary and high school education will, in the future, have modules of instruction involving conflict management and dispute resolution processes (including traditional court adjudication); (2) that the ABA and the Association of American Law Schools will agree on specific courses (such as survey courses on contract law, tort law, property law, and constitutional law) that must be taken and passed as a prerequisite to applying to law school; and (3) that the goal of legal education will be to teach students a full range of practice skills with an emphasis on those skills related to extrajudicial dispute resolution.

During the first two years, students would be taught by instructor teams. All of the instructors would not have to be lawyers. At least one person on each First Year instruction team would have to hold a master’s degree or Ph.D. in either psychology, communications, or some related field. All lawyer-instructors would be required to have at least five years of experience as a practitioner (advocate, legal advisor, arbitrator, mediator, etc.), prosecutor, or judge.

Legal research, analysis, and writing would be taken by the students all three years. Each semester, these classes would focus on different law topics, such as torts and contracts. The instruction team would also concentrate on these topic areas in teaching the other courses during the semester. The law topic focus would change during other semesters with all preceding topics available for use in the simulations. The system would heavily emphasize the use of the computer both in legal research and in dispute resolution. The first semester of the first year curriculum would include courses on law and dispute resolution processes, communication processes, and learning processes. A course on thinking processes would include logic, creative thinking, theories of cognition, perception, problem design, and problem solving. The second semester of the first year would consist of a traditional moot court course involving written briefs and oral arguments. Other courses would address decision-making processes, investigation processes, and judicial decision-making processes.

Second year courses would include, in the first semester, negotiation processes, mediation processes, hybrid processes, and trial advocacy. The second semester would cover advanced negotiation and mediation, arbitration, legal research synthesis, and trial advocacy. The third year curriculum would focus on internships, allowing students to develop practical skills. A unique feature would be a choice of a teaching internship or service in the Law School Clinic Program. The teaching internship would be either at the law school or in a local college, high school, or elementary school. The purpose of this internship would be to enhance the oral and presentation skills of the law students and to help educate law students and other members of the community on effective methods and techniques of dispute resolution. Students would also do internships with an arbitrator, the prosecutor’s office, a private law office, and a trial or appellate judge. Third year students would also take a law training synthesis course similar to the final four month training period at the Japanese Institute. Its purpose would be to review and synthesize the learning of the previous five semesters.

If this type of law school curriculum were widely adopted, law school aptitude and bar examinations would have to be modified appropriately. Also, the legal profession and the public, working together, would have to devise new ways of compensating lawyers for their services. For example, incentives such as “creativity bonuses” for a speedy resolution of disputes with win-win or superoptimum solutions might be considered.

CONCLUSION

Harvard educator Derek Bok probably summed it up best when he said:

If law schools are to do their share in attacking the basic problems of our legal system, they will need to adapt their teaching as well as their research. The capacity to think like a lawyer has produced many triumphs, but it has also helped to produce a legal system that is among the most expensive and least efficient in the world.

With regard to that expensive and inefficient legal system, former Chief Justice Burger, in the 1970s, said:
[perhaps what we need are some imaginative Wright Brothers of the law to invent, and Henry Fords of the law to perfect, new machinery for resolving disputes.]

Creative consumers of justice know that what we need now is imaginative people to invent and perfect new machinery for resolving disputes. Absent that creative focus, continuing efforts at federal court reform, however well intentioned and intellectually inspired, are largely wasted and futile.

ENDNOTES

4 Wheeler & Harrison, supra note 1, at 1.

Colonial government was marked by a lack of distinction between legislative, executive and judicial functions. Id. at 1.
6 Wheeler & Harrison, supra note 1, at 4.
8 Wheeler & Harrison, supra note 1, at 11.
9 Id. at 11-14. In 1867, legislation fixed the Supreme Court's authorized strength at nine justices. Id. at 14.
10 Id.
11 Id. at 11.
12 Id. at 18.
13 Id. at 21.
14 One proposal envisioned an eighteen- member Supreme Court, with nine justices serving on the circuits through a three-judge rotational scheme. Another proposal suggested that the Supreme Court's nine justices be divided into three panels to hear common-law, equity, admiralty and revenue cases, with constitu- tional cases to be heard by the court en banc. Id. at 22.
15 Id. at 24.
16 Id.
18 Klein, supra note 5, at 6-7.
19 Id. at 7.
20 AMERICAN COURTS & JUSTICE 60-61 (Glenn R. Winters & Edward J. Schoenbaum eds., 1976). One of its first projects was a proposed Statewide Judicature Act suggesting a variety of judicial council prototypes having rule-making authority. See Klein, supra note 5, at 7.
21 Winters & Schoenbaum, supra note 20, at 61.
22 Id.
24 Winters & Schoenbaum, supra note 20, at 61.
25 Id. at 53. These efforts were supported by Arthur T. Vanderbilt, a friend and long time adviser of Roscoe Pound, who became President of the ABA in 1937. Klein, supra note 5, at 8.
27 See Roscoe Pound, Organization of Courts, (Nat'l Conference of Judicial Coun- cils, 1940). See also, Klein, supra note 5, at 8-9; see generally Larry C. Berkson, The Emerging Ideal of Court Unification, 60 JUDICATURE 372 (1977); Susan Carbon et al., Court Reform in the Twentieth Century: A Critique of the Court Unification Controversy, 27 EMORY L.J. 559 (1978).
30 Id. at 40-41.
31 Id. at 46.
38 1990 U.S.C.C.A.N. 6803, 6803. There is no specific indication in the legislative history of the Civil Justice Reform Act that the Committee on the Judiciary had considered the earlier recommendations of the Federal Courts Study Committee. It is clear from the legislative history, how- ever, that the Senate Judiciary Committee believed that it received less cooperation from the Judicial Conference of the United States than appropriate. At a June 26, 1990 hearing before the Senate Judiciary Committee, the Judicial Conference an- nounced a position of "disfavor" on the Civil Justice Reform Act. Id. at 6806-07. Federal judges had concerns that the legislation would be counterproductive if enacted. See Diana E. Murphy, The Concerns of Federal Judges, 74 JUDICA- TURE 112 (1990).
41 Id.
45 The Council's Working Group on Civil Justice Reform was chaired by Solicitor General Kenneth W. Starr and was composed of experts from the Department of Justice, the White House Counsel's Office, the Office of Policy Development, the Office of Vice President, the Departments of Commerce, Treasury, Energy and Health and Human Services, the Office of Management and Budget, the Council of Economic Advisors and the Environmental Protection Agency. Press Release of August 13, 1991 accompanying AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (President's Council on Competitiveness, Aug. 1991).
46 Memorandum from the Vice President accompanying AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA, supra note 45.
47 Deborah R. Hensler, Taking Aim at the American Legal System: The Council on Competitiveness's Agenda for Legal Re-
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Lead Articles


The ABA Working Group consisted of the President, President-Elect and Past-President of the ABA, three representatives of the ABA Board of Governors, and representatives of thirteen Sections, Committees and sub-entities of the ABA. Working Group on Civil Justice System Proposals, ABA BLUEPRINT FOR IMPROVING THE CIVIL JUSTICE SYSTEM (ABA 1992).


Excellent elementary school materials already exist for teaching conflict resolution and its relationship to the court system. See e.g. LINDA RIEKES et al., CONFLICT COURTS AND TRIALS (1991). Other materials similarly exist for teaching children conflict resolution skills. See e.g. VIVIAN EINSTEIN, CONFLICT RESOLUTION (1985).


EDWARD DE BONO, LATERAL THINKING: CREATIVITY STEP BY STEP 141-147 (1990); see also JOHN W. COOLEY, APPELLATE ADVOCACY MANUAL ch. 2., 167-171 (1989).

See DE BONO supra note 57, at 167-174; COOLEY, supra note 57, at 182-84.

Using the analogy technique, the item compared does not necessarily have to be closely similar. Actually, the differences often spawn useful ideas. DE BONO, supra note 57, at 169.


In the Tokugawan period, litigation was seen to disrupt societal harmony so strongly emphasized by Confucianism. Conciliation was the dominant feature of civil procedure during the Tokugawan period and persists in Japan even to this day. ELLIOT J. HAHN, JAPANESE BUSINESS LAW AND THE LEGAL SYSTEM 10 (1984) (chapter 2 of this treatise also published in a slightly revised form in 5 NW. J. INT'L L. & BUS., 517 (1983)).

The widely-touted impression that Japan has a minuscule number of lawyers in comparison to the United States is quite misleading. First of all, the population of Japan is about half that of the United States. MILLER, supra note 60, at 202. Secondly, Japan has several groups of “quasi-lawyers” (scriveners, benrishi, zairishi) who perform many of the functions routinely performed by full-fledged lawyers in the United States. HAHN, supra note 62, at 14-15.

The Japanese judicial system is similar to a typical state court system in the United States. An unusual feature of Japan's supreme court is that only ten of the fifteen authorized judicial positions need be filled by law-trained professionals. HAHN, supra note 62, at 19-20.


Excellent elementary school materials already exist for teaching conflict resolution and its relationship to the court system. See e.g. LINDA RIEKES et al., CONFLICT COURTS AND TRIALS (1991). Other materials similarly exist for teaching children conflict resolution skills. See e.g. VIVIAN EINSTEIN, CONFLICT RESOLUTION (1985).